BOARD OF PUBLIC UTILITIES

Affiliate Relations, Fair Competition and Accounting Standards, Public Utility Holding Company Standards and Related Reporting Requirements

Proposed New Rules:	N.J.A.C. 14:4-4A.1 to 4A.3
Proposed:	December 19, 2005 at 37 N.J.R. 4889(a)
Adopted By:	August 16, 2006 by the Board of Public Utilities, Jeanne M. Fox, President, and Frederick F. Butler, Connie O. Hughes, Joseph L. Fiordaliso and Christine V. Bator, Commissioners.
Filed:	August 23, 2006, 2006 as R. 2006 d.339, with substantive and technical changes not requiring additional public notice and comment (N.J.A.C. 1:30-6.3).
Authority:	N.J.S.A. 48:2-1 et seq., in particular 48:2-13, 48:2-16; 48:2-16.1; 48:2-16.2; 48:2-23; 48:2-29.2; 48:2-37; 48:2-51.1; 48:3-7; 48:3-9; 48:3-10; 48:3-49 et seq.
BPU Docket Number:	AX05070641
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The New Jersey Board of Public Utilities ("Board" or "BPU") is herein adopting new rules addressing the diversification activities of New Jersey public utilities and companies owning such utilities, found at N.J.A.C. 14:4-4.

It should be noted that a recent proposal to readopt N.J.A.C. 14:4-4 (see 37 NJR 3911(a)) has affected the codification of the chapter in which these new rules are located. This proposal takes this proposed recodification into account, and the new rules adopted herein are recodified as N.J.A.C. 14:4-4A. Specifically, the rules currently located at N.J.A.C. 14:4, Interim Environmental Information Disclosure Standards, have been proposed for recodification, with non-substantive amendments, as N.J.A.C. 14:8-3 (see 37 NJR 3940). As part of that same proposal, the existing Affiliate Relations Standards now found at N.J.A.C. 14:4-5, are proposed to be recodified as N.J.A.C. 14:4-3 (see 37 NJR 3927).

The rules adopted herein were published as a proposal in the New Jersey Register on December 19, 2005 and comments were accepted through February 17, 2006. Additionally, a public hearing was held on February 7, 2006 at the Board's offices, to afford members of the public the opportunity to place oral comments on the record. Mark Beyer, the Board's Chief Economist, and Beth Sztuk, Chief Operating Officer, presided as hearing officers at the public hearing. They recommended the Board adopt the rule proposal as changed herein. To view the public record, feel free to contact the Board's Office of Case Management at (973) 648-2026.

Eight persons submitted timely comments, which are summarized below, with the Board's responses.

Summary of Public Comments and Agency Responses

1. Tracy Thayer on behalf of New Jersey Natural Gas ("NJNG")
2. Ira Megdal on behalf of South Jersey Gas Company ("SJG")
3. Fred S. Grygiel ("Grygiel")
4. Henry M. Ogden on behalf of the New Jersey Division of the Ratepayer Advocate ("RPA")
5. Roger E. Pederson on behalf of Atlantic City Electric Company ("ACE")
6. Marc Lasky on behalf of Jersey Central Power and Light ("JCP&L")
7. John Carley on behalf of Rockland Electric Company ("RECO")
8. Tamara Linde on behalf of Public Service Electric and Gas ("PSE&G")

For ease of reference, the comments and responses have been separated into the following subject areas:

A. The Board's Existing Protections
B. PUHCA Protections
C. The Proposed Rule and State Law
D. The Reporting Format and Procedures
E. The Definitions

F. The Percentage Adjustment Provision
G. State and Federal Policy

H. Alternative Policies
I. Grandfather Provision

A. The Board's Existing Protections

COMMENT (NJNG, SJG, ACE, JCP&L, RECO and PSE&G): The Board currently has extensive and effective protections in place through existing statutory grants of authority and related regulations such that additional protections are not needed at this time.

In place right now are New Jersey statutes, regulations and Board orders that provide protections for the public and that also afford the BPU with regulatory authority over the interactions, financial transactions and relationships among a public utility, its parent holding company and any non-utility affiliates. For example, in addition to the basic statutory authority the BPU has over the rates charged by a New Jersey utility through N.J.S.A. 48:2-21, all utility financings must be approved by the BPU (N.J.S.A. 48:3-7 and 3-9), and the issuance of dividends by the utility is also subject to statutory restrictions (pursuant to N.J.S.A. 48:2-29.1 and 29.2) upon a finding by the BPU that a utility has not complied with a Board order or is unable to provide its customers with safe, adequate and proper service. Included within the Electric Discount and Energy Competition Act (EDECA), N.J.S.A. 48: 3-49 et seq. are additional protections over the businesses and activities in which a utility can invest or participate and, further strengthening that authority, is the mandate that audits of any competitive services be conducted every two years.

The Board has ample jurisdiction and broad regulatory powers under current statutes and regulations to investigate the activities of public utility holding companies, and ensure that those activities are not detrimental to public utility customers. Specifically, the Board has access to relevant information within public utility holding companies, statutory power over transfers of capital and over service agreements, and full regulatory authority to prevent cross-subsidization. A thorough review of inter-corporate transactions is a standard process of all rate proceedings.

The proposed rules are not necessary for the Board to carry out its mandate to ensure the provision of safe, adequate and proper utility service to customers at reasonable rates. The Board has a comprehensive regulatory scheme in place to regulate New Jersey utilities and relationships of the utilities with their affiliates to the extent those relationships might interfere with the utilities' provision of safe, adequate and proper service to their customers at reasonable rates. This authority is broad and includes authority over rates, service quality, affiliate transactions, the transfer of control over a public utility as well as a variety of other areas and the Board has used this authority prior to repeal of the Public Utilities Holding Company Act of 1935 (PUHCA) without any reliance upon the Securities and Exchange Commission's (SEC) implementation of PUHCA.

Additionally, the Board has many other avenues for protecting utilities from any risk of affiliate diversification, through control of regulatory capital structure, rates of return, the sale or encumbrance of utility assets, contracts with affiliates, and its general authority over customer rates. If necessary, the Board can require any New Jersey utility that is not already so structured to operate as a separate legal entity from its parent or affiliates, as most (if not all) New Jersey utilities already do, and can impose other "ring fencing" protections.

The absence of the proposed rules will not pose unnecessary risks to New Jersey consumers. The Board already has statutory authority to compel the production of books, records, contracts, and accounts from any utility holding company or affiliate company regarding its relations with the utility under N.J.S.A. 48:2-37. Moreover, the EDECA competitive service audit process provides further state authority to access records as necessary.

The Board has a comprehensive regulatory scheme in place to regulate New Jersey utilities and to ensure that such utilities provide safe, adequate and proper service to their customers at reasonable rates. This broad authority has served the Board well and has enabled the Board to regulate New Jersey utilities, their rates and services, and to promote competitive markets far beyond what many other states have accomplished. Historically, the Board has managed this process successfully without relying upon the SEC implementation of PUHCA. Indeed, many New Jersey utilities have never been part of a registered holding company system and have remained exempt from PUHCA. Further, most New Jersey electric utilities have been in some type of holding company system for many years.

RESPONSE: The Board agrees with all of the commenters that the Board possesses sufficient statutory powers to protect public utilities that are members of a public utility holding company. Nevertheless, the Board has historically, in part, relied on PUHCA's diversification limitations, among other protections, to minimize the degree of risk that a New Jersey utility is exposed to by its parent holding company's investment in non-utility related industries. The repeal of PUHCA removes these restrictions on the types of investments – whether utility, energy-related, or otherwise – that can be made by both registered and exempt holding companies. Under PUHCA, the operations of a registered holding company system were limited to "a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system." This requirement limited a holding company system's investments to energy-related businesses. Contrary to the suggestion from certain commenters that they never had to comply with such limitations, exempted holding companies generally needed to comply with diversification restrictions – albeit a less restrictive variant.

Ratepayers of utilities face at least three categories of risk when their utility, or its holding company, invests in nonutility businesses. First, utility holding company investments in nonutility businesses may lead to utility ratepayer subsidies of nonutility services. Second, the acquisition of a utility by a holding company can affect the incentives of utility management as new management may have priorities other than local utility service and may lack the state-specific experience necessary to ensure reliable service at reasonable rates. Third, because the utility industry is capital intensive, utilities are highly dependent on access to the capital markets. When the utility's credit ratings decline as a result of activities at the parent holding company or affiliate, the compensation demanded by providers of capital can increase, putting ratepayers at risk. The Boards existing rules and policies lessen, but do not eliminate, these risks. The proposed diversification rule will lessen even more the risk of such negative effects to New Jersey gas and electric public utilities.

It should also be noted that even under PUHCA, the Board remained concerned about the potential for holding company abuse and the lack of proactive measures for the Board to prevent any potential abuses from ever rising to a level that might threaten customer service. In this context, it is important to recognize that the Board's decision to seek adoption of rules at this time is not merely based upon PUHCA repeal, but is also predicated upon recent actual experiences both nationally, where holding company abuses in the utility sector have been well-chronicled as a result of the Enron and WorldCom corporate scandals, and locally in New Jersey, where the Board recently was called on to deal with holding company abuses in order to protect the customers of a New Jersey public utility. See <u>In the Matter of the Focused Audit of Elizabethtown Gas Company, NUI Utilities, Inc. and NUI Corporation</u>, BPU Docket Nos. GA03030213, GA02020099, GR03050423, GR02120945, GR02040245 and GR01110771, Board Order dated April 26, 2004 (ordering the refund of $28 million to Elizabethtown Gas ratepayers as a result of holding company abuses).

The Board also believes the proposed regulations provide a necessary and appropriate level of standardization and clarity to the Board, its Staff and the regulated community. This clarity will ensure that as the need for and dependence upon electric and gas public utilities continues to increase, customers and the State of New Jersey as a whole are not harmed by electric and gas public utility membership in a holding company family.

COMMENT (RPA): Protection of New Jersey ratepayers is of paramount importance during all proceedings involving the control of any New Jersey utility. As such, we fully support the Board's proposed new subchapter, N.J.A.C. 14:4-4. We do, however, offer the following comments and suggestions, which we believe will enhance the protections afforded to ratepayers under this proposed subchapter.

At the outset it should be noted that we fully support the Board's proposal to regulate the ownership of the utilities it regulates, and to ensure that the regulated utility is not used to subsidize the holding company. Proposals such as this are especially necessary in light of the recent issues involving the former parent of the Elizabethtown Gas Company. See <u>I/M/O NUI Utilities, Inc. d/b/a Elizabethtown Gas Company and AGL Resources for Authority under N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10 for a</u>

Change of Ownership and Control, BPU Docket No. GM04070721, Order dated November 17, 2004.

That being said, the Board should further amend N.J.A.C. 14:4-4 so that the ratepayers are afforded additional protections. In addition to a diversification limitation, the Board should have unfettered access to utility company books and records to protect ratepayers from potential holding company abuses. Additionally, the holding companies should be required to file cost allocation agreements with the Board.

While PUHCA 2005 is purported to be a "books and records access" statute, the Board should adopt its own requirements so that it does not have to rely upon whatever may or may not be adopted by Congress or the FERC. With regard to cost allocation, while PUHCA 2005 allows a state commission to request the FERC to review and authorize the allocation of costs between service companies and public utilities, it does not allow the state commission to do so.

Last year, when the FERC expeditiously approved the merger between Exelon Corporation and Public Service Enterprise Group, Inc., parties wishing to be heard had only sixty days to file comment. Despite many requests from outside parties (including the Board and the RPA) for an evidentiary hearing regarding the creation of the nation's largest utility, the FERC denied all of them. Numerous entities filed requests for a rehearing, which were also promptly denied. Fortunately, the Board is providing a forum for the requisite evidentiary hearing.

The Board should adopt further protections so that it may act on its own in the future and not depend upon possible future federal rules.

RESPONSE: The Board appreciates this comment in support of the rules. With respect to the adoption of further protections, the Board has initiated an informal stakeholder process to consider the adoption of further protections, including many of the suggested protections expressed by the commenter. It should be noted that the commenter has been a participant in the informal stakeholder process. The Board welcomes the commenter's continued participation in that process and will consider the suggestions offered as it continues to evaluate the evolving regulatory environment, including the need for further rulemaking.

COMMENT (Grygiel): These comments are being filed together with comments related to the Board's merger "positive benefits" standard of review based upon the conviction that the cases are clearly related and should be considered by the Board together as part of its ongoing regulatory concerns caused by the consolidations in the electric and gas industries in New Jersey, and the resulting dominance of holding company structures in the state. A similar trend is ongoing in the rest of the country as reflected in the announcement today in The New York Times of further consolidations, "Long Island Power Utility Up For Sale." One of the potential bidders is Consolidated Edison that already owns NJ utility Rockland Electric. The article notes that there are a number of very large energy mergers pending most notably the Exelon-PSEG, FPL Group-Constellation Energy Group and Duke Energy-Cinergy deals.

The Board is in the process of assessing whether its current statutory authority is sufficient to adequately protect ratepayers in New Jersey's electric and gas industries that are characterized by in-state and multi-state holding companies owning all of the New Jersey utilities. Further, the Board is also trying to determine if the recent repeal of the PUHCA 1935 leaves a hole in the protective regulatory fabric that could lead to new exposures of ratepayers to potentially damaging spillovers from the related non-regulated subsidiaries of their parent Holding Companies. Lastly, some of the parent holding companies themselves are engaged in regulated activities in other states that could lead to greater risks and potentially higher rates for their related New Jersey utilities. The complex regulatory issues associated with these industry structures must be confronted by the Board and resolved in a way so as to assure that New Jersey ratepayers have access to safe, adequate and reasonably priced energy services.

The Board currently has authority to conduct rate cases, Management Audits, Focused Audits and a variety of legal tools to compel utilities to provide relevant information as part of sanctioned investigations. However, during the pendency of these actions, the affected New Jersey utility may continue to be under both financial and reputational stress caused by a related subsidiary in their Holding Company or the Holding Company itself. A first priority of the Board should be the development of a "ring-fencing" process that would lead to the protection of NJ utilities and their ratepayers. This safe harbor could be accomplished either through the ring-fencing of the utility or the offending related subsidiary. The end result would be that the Board could then conclude its case/investigation knowing that no further harm would be inflicted on the utility or its ratepayers while the litigation for a permanent remedy moves to completion. In the case where the Holding Company itself was the problem, the Board would likely have to contemplate and negotiate ways of divesting or spinning out the utility if the offending Holding Company did not agree to cure their problems via some ring-fencing option subject to Board approval.

As the corporate governance reform movement continues to affect the way companies organize and govern, the Board has to establish some formal oversight of these practices adopted by each of the Holding Companies that own all of the New Jersey's electric and gas companies. Although the Board's direct regulatory jurisdiction over the Holding Companies is debatable, its interest in and jurisdiction over the utilities is not in doubt. Therefore the Board in its exercise of its authority over the financial and operational integrity of each utility should become active in evaluating the corporate governance practices of all holding companies that own NJ utilities. There is emerging evidence that these practices have direct and significant impacts on financial performance, development of an ethical culture in corporations, improved employee productivity, greater commitments to diversity and overall social responsibility of corporation. Given the pivotal role played by utilities in the provision of infrastructure services, the Board should be active in assuring New Jersey ratepayers that the Holding

Companies that own NJ utilities are proactively adopting progressive corporate governance practices.

RESPONSE: The Board appreciates this comment in support of the rules. However, the comment proposes measures above and beyond the scope of this rulemaking. This rule proposal is specifically limited to the imposition of a 25% diversification limitation. However, the Board has initiated an informal stakeholder process to consider the adoption of further protections, including some of the protections suggested by the commenter. It should be noted that the commenter has been a participant in the informal stakeholder process. The Board will consider the suggestions offered as it continues to evaluate the evolving regulatory environment, including the need for further rulemaking.

B. PUHCA Protections

COMMENT (PSE&G, ACE, JCP&L, and RECO): There is no evidence that PUHCA provided vital regulatory protections to New Jersey and its New Jersey utility customers. Therefore, there is no basis upon which the Board can conclude that the proposed rules are necessary to protect New Jersey ratepayers from the repeal of PUHCA. Additionally, the informal stakeholder process has not uncovered any systemic failure in the Board's ability to regulate New Jersey utilities, or shown any harm to New Jersey ratepayers from diversification activities of utility holding companies.

It should also be noted that PUHCA did not contain a cap on non-utility investments by holding companies similar to the cap the Board is proposing here. PUHCA repeal will have little if any impact on New Jersey utilities and the Board's comprehensive authority to regulate New Jersey utilities will continue to be as strong without regard to PUHCA repeal. In addition, the absence of the proposed rules will not pose unnecessary risks to New Jersey consumers.

Almost all of the utilities that the Board has historically regulated are not part of holding company systems registered under PUHCA. In fact. until the 1990s, JCP&L was the only New Jersey utility that was part of a PUHCA-registered holding company system. Moreover, New Jersey's largest utility, PSE&G, was never part of a PUHCA-registered holding company system.

RESPONSE: As discussed above, the Board has relied on PUHCA's diversification limitations, among other protections, to minimize the degree of risk that a New Jersey electric or gas public utility is exposed to by its parent holding company's investment in non-utility related industries. Contrary to the contentions herein that some New Jersey utilities, including the largest one, never had to comply with such limitations, exempted holding companies generally needed to comply with diversification restrictions – albeit a less restrictive variant. Although PUHCA did not limit diversification directly for exempt holding companies, 15 U.S.C. §3(a)(1), it nevertheless limited diversification for these companies indirectly—by requiring the SEC to revoke an exemption (which is what permits the diversification in the first place) if it becomes "detrimental to the public interest, or the interest of investors or consumers." 15 U.S.C. §79c(a)(1).

C. The Proposed Rule and State Law

COMMENT (PSE&G, ACE, and RECO): The proposed rules either violate the Administrative Procedures Act (APA) or exceed the authority of the Board's statutory power. There is nothing in New Jersey law that extends the Board's authority to the extent necessary to impose this proposed cap on the investments of a holding company parent. The proposed rules raise serious legal questions, not least of which is their impact on interstate commerce in particular, as well as competition in general. The Board has no direct jurisdiction over the diversification efforts of affiliates of the regulated utilities.

The proposed rule's reference to statutory provisions does not appear to support the Board's authority to impose rules on holding companies. Additionally, the cite to statutory provisions in the proposed rules is not consistent with the New Jersey APA, N.J.A.C. 1:30-5.1(b)(6), which requires: "[a] citation to the specific N.J.S.A. statutory authority for the proposed rule of the Public Law number if an N.J.S.A. citation is not available." An agency may not cite its general statutory authority unless specific legal authority is unavailable and the agency is relying on its general or residual power, in which case a statement to that effect shall be made in the summary.

The New Jersey Administrative Procedure Act requires rules, unless exempt, to have a sunset date. NJAC 1:30-6.4. The proposed rules are not of the type that would be exempt from these sunset requirements. If the Board does not establish a specific sunset date to reconsider the effectiveness of the rules, a generic sunset date will be established and the proposed rules will be set for reconsideration with many other Board regulations. The proposed rules are unique enough that it would be appropriate to distinguish them from that generic process. The Board should consider a specific sunset date of two years or less.

RESPONSE: The Board considers its proposed rules to be in complete accord with the provisions of N.J.A.C. 1:30-5.1(b)6. In addition to citing specific statutory authority in the form of specific statutory provisions listed in the rule proposal, the Board also believes that its general statutory authority to secure safe, adequate and proper utility service to New Jersey customers quite clearly supports the limited jurisdiction over public utility holding companies proposed therein.

It is well-established that the Board "may exercise jurisdiction not only over the bottom corporate tier of the chain, the actual New Jersey [public utility], but to any entity which owns, controls, manages or operates that entity." N.J.S.A. 48:2-13. See also, <u>In Re Proposed Corporate Restructuring of Tele-Communications, Inc.</u>, BPU Docket No. CM90121496, Order dated February 2, 1991. This sweeping grant of power is "intended to delegate the widest range of regulatory power over utilities to the [BPU]." <u>In Re Alleged Violations of Law by Valley Road Sewerage Company</u>, 154 <u>N.J.</u> 224, 235 (1998) (citing Township of Deptford v. Woodbury Terrace Sewerage Corp. , 54 <u>N.J.</u> 418, 424, 255 A.2d 737 (1969). The BPU's authority over utilities, like that of regulatory agencies generally, extends beyond powers expressly granted by statute to include incidental powers that the agency needs to fulfill its statutory mandate. Ibid. The police power of a public body is the most essential and least limitable power of government in that it coincides with the need and welfare of the public. Katobimar Realty Co. v. Webster, 20 N.J. 114, 123 (1955).

The Board believes that the statutory provisions cited in this rule proposal as well as well-established case law provide clear authorization for it to regulate the financial structure and investments of public utility holding companies to the extent necessary to discharge its obligation to police the rates charged for the provision of utility service. Moreover, there have been many occasions where the Board has examined certain proposed transactions of public utility holding companies and/or exercised jurisdiction based on the "own, operate, manage or control" language of N.J.S.A. 48:2-13. See e.g. In Re New Jersey Resources v. NUI, BPU Docket No. 8312-1093, Order dated January 31, 1984 (holding that the holding company's ownership of the utility, combined with the specific nature of the transaction, directly impacted the utility's interest and justified the exercise of Board jurisdiction).

It should also be noted that when the New Jersey public utility holding companies were created they all were required to, and did receive, Board approval. Many of these approvals noted the Board's authority over inter-corporate transactions and specifically conditioned approval of the holding company formation upon the imposition of a diversification restriction not unlike the one proposed herein. See e.g., In the Matter of a Focused Audit of Public Service Enterprise Group, Incorporated and its Subsidiaries, Docket No. EA92040459, Order dated May 25, 1993 (PSEG's unregulated subsidiary, Energy Holdings, was precluded from investing more than 20% of PSEG's consolidated assets in non-utility businesses without prior notice to the Board). The present rule merely seeks to codify the existing, long-standing authority of the Board in the area of holding company diversification in recognition that recent events in the public utility industry, including the repeal of the Public Utility Holding Company Act of 1935 and the Board's specific recent experience with holding company abuses, could expose New Jersey customers to unnecessary added risks.

Regarding the sunset date for these rules, the sunset date is established by the New Jersey Administrative Procedure Act, such that the rules will expire five years after the adoption of the chapter in which the rules appear. However, the Board can review and amend the rules at any time after their adoption, should the Board determine that such review and amendments are necessary. Therefore, there is no need for the Board to establish a specific sunset date for the rules.

In sum, based upon the statutory provisions cited in this rule proposal as well as long-established case law, the Board has the authority to regulate the rates utilities charge consumers either directly, by requiring commission approval of rate increases, or indirectly, by controlling certain investments and attempts at diversification.

D. The Reporting Format and Procedures

COMMENT (NJNG, ACE, RECO and PSE&G): The Board's need for and authority to require the certifications sought in N.J.A.C. 14:4-4.3(b) are unclear. At a minimum, changes should be made to the reporting requirements proposed. A standard reporting format should be provided that will ensure all companies provide the same information to the Board. Additionally, the information should be provided in conjunction with the annual reports submitted by each New Jersey public utility.

At the outset, it must be noted that the Board is seeking certifications from out-of-state utility holding companies that it does not regulate. To put this matter in perspective, the proposed certifications are significantly more demanding than those required under the Sarbanes-Oxley Act. For example, Section 302 of the Sarbanes-Oxley Act does not require certifications from the Board of Directors. If the Board must have a certification regarding compliance with the cap, then as a reporting mechanism, it should be sufficient to have a senior officer of the holding company provide it instead of the entire board of directors. A senior officer signing the certificate can certify that he/she presented the calculations to the board of directors, and described the methodology for making the calculation, and that the board had approved the procedure and authorized him/her to make the certification to the Board. It is both unnecessary and overly burdensome to require duplicative certification from both the utility board of directors and the holding company board of directors.

In addition to problems with the certification itself, there exists some ambiguity as to how the calculation of assets should be performed. For example, would all "assets" on the books of a subsidiary count toward the calculation including non-operating assets such as goodwill? Would equity in subsidiaries be eliminated? Further, it is not clear how often the 25% calculation would be performed. The Board should provide further clarity on these issues and should consider clarifying that the term assets is limited to physical assets or assets related to operations, and excludes such things as goodwill or other accounting adjustments.

The Board should also clarify that investment in subsidiaries should be eliminated for purposes of implementing this calculation. This will ensure that assets are not double counted. For example, a review of a holding company's books would show significant investment in subsidiaries. Under the Board's proposed rules, however, each of those subsidiaries would be separately evaluated. Counting both the investment in subsidiaries and the assets of the subsidiary level would be double counting and would result in over-estimating the assets of the company.

The Board should also consider clarifying that the proposed limitation is to be evaluated on an annual basis rather than on a more frequent basis. This annual calculation would provide greater flexibility for changes in asset value during the year that is not inconsistent with the intent of the rules. Further, the Board should provide a date by when the report must be filed. For example, April 15th of each year would perhaps be appropriate. The report would include information as of December 31st of the prior year (or, if the holding company is not on a calendar year, the report would be due 105 days following the end of its fiscal year).

Finally, the Board should apply the diversification limit to investments rather than assets. Under PUHCA, the SEC reasoned that the harm, if any, that could befall a utility's operations by reason of non-utility investment depended on the amount the holding company had "at risk," i.e., the amount of its investment. The SEC recognized that the size, per se, of non-utility investments was not predictive of possible harm to the utility. Indeed, the level of assets could vary greatly from year to year depending on the success of the business. A minimal "investment" in a company that turns out to be very successful, and has its assets grow through borrowings and net income reinvested in the business, could as a result cause the proposed 25% cap to be exceeded. The proposed rule punishes holding companies that make successful investments. If a successful investment passes the proposed 25% asset test, and even if only a lesser amount were actually invested, the holding company would be in non-compliance.

RESPONSE: In reference to the suggestion that a standard reporting format be provided that will ensure all companies provide the same information to the Board and that the information be provided in conjunction with the annual reports submitted by each New Jersey public utility, the Board agrees and has therefore made revisions to the rule upon adoption. It was always the intention of the Board that the required reporting be submitted in compliance and conjunction with the annual report. Therefore, the changes to the rule explicitly state that the requested information be provided in a utility's annual report (N.J.A.C. 14:4-4A.3(c)) and reflect the previous fiscal year (N.J.A.C. 14:4-4A.3(c)4). These changes will make explicit for clarification purposes the Board's original intention of assuring that no duplicative reports are filed with the Board, and thus will reduce the administrative burden on both the utility and the Board. Moreover, the addition of N.J.A.C. 14:4-4A.3(c)4 makes explicit, for clarification purposes, the original intent of the Board to require the certification of the asset calculation be on an annual, end-of-year basis. This clarification will: (1) make the rule consistent with the required time-frame for the other data required in the annual report; (2) provide greater flexibility for changes in asset value during the year; and (3) eliminate the administratively burdensome task of calculating asset values on an ongoing basis – instead, the utilities will merely need to calculate assets and certify compliance once a fiscal year, which was the original intent of the Board.

All electric or gas public utilities are required to generally submit the same information in their annual reports and pursuant to these rules upon adoption, and therefore, the Board rejects the suggestion that further standardization of the information is required.

With regard to the concerns expressed about the board of directors' certification requirements, the Board rejects the commenters suggestion that only the CEO should certify compliance with the rules. While the Board's intention was to be consistent with Sarbanes-Oxley, which as the commenters point out only requires certification by CEOs and not the board of directors, utility regulation requires additional protections that are not present in other industries and therefore, not part of the economy-wide Sarbanes-

Oxley Act. There are significantly more risks involved in utilities being owned by a holding company than there are in other industries. Consequently, board of director certifications are an added tool to ensure that sufficient deliberation of important issues take place in the policy-making branch of a utility and its holding company.

However, in order to decrease the procedural burden of certification, the Board has made a minor change to N.J.A.C. 14:4-4A.3(c)(3) upon adoption. The change requires the board of directors to authorize the CEO to make the certification to the Board. This will require, for example, that the CEO present the calculations to the board of directors and describe the methodology for making the calculation. This change will ensure that the Board's intent to have the board of directors ensure compliance with the rule upon adoption is satisfied, while at the same time eliminating the administrative burden of having special board of director meetings merely for the purpose of certifying compliance with the rule upon adoption.

With respect to commenters concerns on using aggregate assets as the basis for calculating the 25 percent cap, the Board rejects the use of "aggregate investments" as a replacement for "aggregate assets." The Board recognizes that the SEC has used aggregate investments in its analysis, and in many ways this a better approximation of the risk involved in diversification. Nevertheless, other states have utilized asset calculations as a proxy for investment risk.

However, the Board does see certain benefits from using aggregate investments for calculation purposes, but such a clarification would be considered an improper substantive change upon adoption. Accordingly, the Board will propose amending the basis for calculating the 25 percent cap and replacing the term "aggregate assets" with "aggregate investments" as part of its future rulemaking process.

E. The Definitions

COMMENT (PSE&G, RECO and SJI): The excluded categories of companies not subject to the diversification cap are not generally viewed as less risky than subsidiaries involved in other non-utility businesses. That being said, the definition section found at N.J.A.C. 14:4-4.2 should be modified to ensure that certain non-regulated assets that are clearly related to the provision of utility service do not count toward the 25% diversification restriction. One specific modification recommended is to include within the definition of "utility associate" the term "thermal energy". The provision of "thermal energy" is clearly related to the core utility business function of providing utility service. Therefore, "thermal energy" should qualify as a "utility associate" business.

In addition to "thermal energy," the Board should consider other categories of permissible activities and certain modifications to the application of proposed rules. As drafted, the proposed rule could be interpreted to result in more aggressive restrictions than existed under PUHCA. Recognizing that this is not the intent of the Board, a stakeholder meeting to examine carefully the definitions and other aspects of the proposed rule would perhaps be helpful.

Additionally, the Board should clarify how it will treat subsidiaries that have no revenues or have revenues that are not related to non-operating revenues, but rather to such activities as dissolution of a subsidiary, tax consequences or other non-recurring, out-of-the ordinary activities. One reading of the proposed rules would treat such entities as non-utility associates, since they do not meet the utility associate definition. If this is the case, the assets of these companies would count against the proposed 25% cap and the proposed rule could lead to skewed results. For example, if a subsidiary's only purpose is to own real estate around a power generation plant for environmental reasons or other legitimate purposes, but the subsidiary has no revenues, it arguably would not satisfy the definition of utility associate. Despite the fact that such a subsidiary's investment and activities are clearly within the scope of the permissible activities that the proposed rule seeks to promote, its assets could still count against the proposed 25% cap. Clearly, this would frustrate the stated intent of the proposed rules and must be clarified. This clarification could be accomplished in several ways such as modifying the definition of utility associate by inserting "operating" before revenue and adding language to provide that subsidiaries with zero or nonrecurring revenues would not count toward the proposed 25% cap.

The definition of utility associate should include additional specific types of activities. Revenues from utility-related activities that are consistent with the intent of electric or gas related service should be considered exempt from the 25% limitation. Non-regulated businesses that are intimately linked to the core utility business function should be included within the "utility associate" definition.

Another definition which needs clarification is the reference to "existing products and/or services." "Existing products and/or services" is defined by NJAC 14:4-5.2 as: "those products and/or services which an electric and/or gas public utility was offering prior to January 1, 1993, that have been approved by the Board prior to February 9, 1999, or an electric and/or gas public utility is offering on the effective date of the adoption of these standards. The use of this definition in the context of the proposed rules is unclear because the definition of existing products and/or services by its own terms applies only to services that were being offered by a public utility. This limited reading, however, would not appear consistent with the Board's stated purpose. For example, if the Board considers appliance services as an existing products and/or service, the Board should clarify that revenues derived from such services by a subsidiary that is not a New Jersey public utility would also be considered to count toward the utility associate category. This clarification could be achieved by amending the definition of existing products and services or the definition of gas and electric related service.

To ensure that the proposed rules do not result in a diversification limit that is more restrictive that what the Securities and Exchange Commission ("SEC") applied to registered holding companies, the rules should be revised to provide that categories of permitted investments include: Entities that are developing facilities that will engage in utility or utility associate activities (e.g., a plant under construction) ("Development Companies") and entities that are directly related and subordinate to utility or utility associate activities (e.g., a separate entity that provides fuel to a generating plant.) ("Directly Related Subordinate Entities"); Entities that directly support the utility or utility associate activities, such as, but not limited to, nuclear decommissioning trusts, entities to facilitate tax advantages, entities to facilitate financing transactions, captive insurance and other risk management entities and entities that hold or manage emission allowances or other environmental allowances or credits ("Supporting Entities"); and Entities that are intermediate holding companies that have no activities other than holding their subsidiaries where the revenues or assets of all such subsidiaries are accounted for as nonutility associates or utility associates, as appropriate, as well as inactive entities with no business activities ("Disregarded Entity"), which should be disregarded and not count in any category.

RESPONSE: As stated in the Proposal Summary, at 37 N.J.R. 4889(a), the proposed new rules would prevent a holding company from investing more than 25 percent of the combined assets of its utility and utility-related subsidiaries into businesses unrelated to the utility industry. In addition, the proposed rules would prevent a holding company whose primary businesses are not utility-related from purchasing a New Jersey utility, unless they divest a sufficient amount of non-utility assets in order to comply with the rules.

Because it is the intent of the Board to keep pace with evolving technology in the energy business, the Board agrees that thermal energy should be included as an energy-related business similar to those listed within the definition of "Utility associate." The provision of thermal energy is clearly related to the core utility business function of providing utility service because it uses preexisting natural gas and gas pipeline infrastructure as a component of the service. Even though the Board believes that thermal energy is already subsumed by the definition of utility associate, it is the intention of the Board to be as clear as possible in defining permissible businesses. Therefore, the Board believes thermal energy clearly falls under the intent of the Board's utility associate definition and has modified the definition to reflect this.

Moreover, the Board has accepted the other suggested comments with respect to clarifying the definition of "utility associate." Propane is included because it reflects the intention of the Board to include all heating fuels in the definition of utility associate activities. Many of our utilities provide propane services already, and therefore such activities are consistent with the intent of the utility associate definition to include activities related to the core activity of utility service. The word "heating" was included as a modifier to "oil" in order to clarify the intent of the Board to include only fuels thate are used for producing electricity or heat. The addition also clarifies the intent of the Board to exclude petroleum from the definition of utility associate activities. Oil is often used to describe petroleum, which is an energy source for automobiles, trucks and industrial activities. These activities are not associated with utility service, and thus were never intended to be included in the definition of utility associate. Therefore, the term "heating oil" clarifies the Board's intent that "utility associates" are business enterprises that are related to the provision of utility service.

In order to further explain this point, as well as provide as much guidance as possible to the regulated community and interested parties, the Board has also modified the definitions of utility associate and non-utility associate on adoption by including examples of various activities that would either fall within or be excluded from the definitions. The purpose of this inclusion is to make the definition as clear as possible and compliance as easy as possible, and therefore is consistent with the Board's intent. Moreover, the definition of "existing products and/or services" was modified to include services that were not provided by a public utility. The purpose of this change is to make the definition more consistent with the intent of the Board, which is to exclude all pre-approved services – whether in-State or out-of-State – from the restriction on diversification activities. Without the change, only pre-approved services provided by in-State utilities would be included. Without the change, utilities with subsidiaries in other states that provide pre-approved services would be unfairly disadvantaged.

With regard to the comment that the services excluded from the diversification cap are not considered to be less risky than non-utility businesses, the entry of a public utility or its holding company into business sectors outside the core business of utility related service creates special risks to captive ratepayers—those who depend on a utility for an essential service and cannot shop elsewhere. A public utility's expertise is in energy-related services, and therefore the likelihood of investments failing in areas outside of the energy sector, is increased.

F. The Percentage Adjustment Provision

COMMENTS (ACE and PSE&G): The provision allowing the Board to adjust the percentage level an additional ten percentage points higher or lower for each utility as it deems appropriate to ensure safe, adequate and proper service creates too much uncertainty and will unnecessarily inhibit reasonable and appropriate business development. Rather than imposing a fixed 25% cap with a possible upward and downward adjustment, the Board should consider establishing 25% as a safe harbor, while allowing utilities to seek increases to that level on a case by case basis. This approach is consistent with the SEC's former Rules 53 and Rule 58, and will result in a more refined and flexible approach.

RESPONSE: The Board accepts the validity of these comments and has made the appropriate changes to the rule upon adoption. The Board's intention with respect to this provision was always to promulgate a rule provision that provided certainty while preserving some flexibility.

However, the commenters have exposed problems with the proposed rule, as drafted, which would likely lead to both confusion and uncertainty. First, although intended to provide the Board with the flexibility to adjust the 25 percent diversification upward or downward by as much as 10 percentage points, the Board now recognizes that the proposed rule, as drafted, was confusing in that it could be read to only allow the Board to adjust the 25 percent up 10 percent (that is to 35 percent) or down 25 percent (that is to 15 percent). The Board never intended for the rule to be this inflexible. Rather, the intention was always to afford the Board the flexibility to adjust the 25 percent diversification level.

Second, although the intention of the 10 percent adjustment upward or downward was to provide certainty with respect to maximum adjustments that could be made, the rule, as drafted, would in fact have provided unwanted uncertainty to the investment community and expose the utilities and their parent holding company families to unnecessary business risk. The Board never intended for parent holding companies that make long-term business decisions based upon a 25 percent diversification limitation to have to factor into those business decisions the regulatory risk that the Board could suddenly lower their cap to some level below 25 percent, thus forcing the parent holding company family to have to rapidly divest themselves of assets. As indicated in the Proposal Summary at 37 N.J.R. 4889(a), these rules are intended to “prevent a holding company whose primary businesses are not utility related from purchasing a New Jersey utility, unless they divest a sufficient amount of non-utility assets in order to comply with the rules.” It was never the intention of the rules to inhibit a parent holding company whose primary businesses are utility related from purchasing a New Jersey utility.

Accordingly, the rule has been clarified on adoption to remedy the potential confusion and uncertainty. Moreover, by including reference to the filing of a petition by an electric or gas utility for permission for an upward adjustment and the case-by-case review, the Board has clarified the appropriate regulatory process to be utilized in evaluating an adjustment to the 25 percent diversification restriction.

G. State and Federal Policy

COMMENT (ACE, JCP&L, and RECO): The proposed rules violate state and federal policy. The Energy Policy Act of 2005 (EPAct) intentionally removed barriers to diversification that had been raised by PUHCA. The proposed rules run counter to an interest that should be of substantial concern to the Board—attracting investors in the state’s utilities. Investors are critical to provide utilities with the sources of capital required for the significant infrastructure investments necessary to maintain and enhance service to New Jersey consumers. By limiting the extent to which utility companies can diversify — a reasonable criteria for making investment decisions — the proposed rules could discourage investment in New Jersey utility companies. Limiting the sources of investment likely will make investor financing less accessible and drive up the costs of investor-supplied capital. Limiting investment also will serve to limit the sources of innovation and expertise available to New Jersey’s utilities. Allowing for the benefits of such investment is one of the reasons Congress repealed PUHCA. The proposed rules also run counter to the Board’s goal of fostering economic growth in New Jersey because some diversified companies that may otherwise find New Jersey a lucrative place to locate may seek opportunities elsewhere.

Arguably, the proposed rules violate state law. New Jersey addressed the issue of diversification into competitive services in 1999 as part of the enactment of EDECA, N.J.S.A. 48:3-59 et seq. Sections 7 and 8 of EDECA, N.J.S.A. 49:3-55 and 56, provide the Board with ample authority over competitive services undertaken by utilities, while specifically authorizing the offering of competitive services by utility holding companies and affiliates (EDECA §7, N.J.S.A. 49:3-55(j)), subject to rules and regulations promulgated by the Board. In the context of EDECA §7, the contemplated rules and regulations were meant to protect against inappropriate utility subsidization of non-utility activities and otherwise prevent affiliate abuses, issues that are now addressed in the Affiliate Relations, Fair Competition and Accounting Standards and Related Reporting Requirements, N.J.A.C. 14:4-5.

The State Legislature never intended for the Board to adopt rules that would result in a prohibition on utility affiliates from engaging in such activities to the extent embodied in the Proposed Rules. As a result, this attempt to revoke, through administrative rule-making, EDECA's explicit authorization for utility affiliates to engage in competitive activities appears to contravene the legislative intent and might well be ineffective.

Limiting investment in the manner proposed could serve to limit the sources of innovation and expertise available to New Jersey's utilities. Companies with related areas of expertise, for example, manufacturing, defense, chemical, engineering and marketing, could serve as responsible and forward-looking investors in a utility company. Allowing for the benefits of such cross-fertilization is one of the reasons for the repeal of the PUHCA.

In repealing PUHCA, Congress did not intend that utilities should be subjected to new burdensome regulations and increased record keeping requirements. Imposing additional restrictions on public utilities and their parent holding companies, particularly those companies that were never subject to PUHCA's reporting requirements, is not appropriate. Repeal of PUHCA was intended to reduce the level of holding company regulation. The proposed rules, however, would have the opposite effect.

RESPONSE: The Board is confident that its rule proposal does not conflict with either State or Federal law. Section 1269 of EPACT, P.L. 109-58, expressly disclaims any intent to preclude a state commission "from exercising its jurisdiction under otherwise applicable law to protect utility customers." Therefore, there is no preemption in EPACT or other federal law that would prevent the Board from enacting these rules. With regard to state law, the competitive services addressed in EDECA do not count towards the diversification cap, and therefore the rules do not conflict with EDECA.

The Board does not anticipate that these rules will result in the loss of existing jobs in New Jersey because the rules will likely strengthen New Jersey electric or gas public utilities. For that very same reason, the prospect of additional new jobs in New Jersey being created is increased since our utilities will be financially stronger and may use any surplus funds to expand their utility and utility-related businesses in New Jersey. Moreover, the new rules will likely have a positive social impact in that they will assist in protecting the financial integrity of New Jersey public utilities and ensure that the public can have confidence in their ability to provide safe, adequate and proper service.

The rules may also reduce operating costs for New Jersey public utilities because the ownership of New Jersey electric or gas public utilities by public utility holding companies create unique problems that require specific regulatory oversight. First, holding company investments in non-utility businesses may lead to ratepayer subsidization of non-utility services. Second, the acquisition of a utility by a holding company can affect the incentives of utility managers, as new managers may have priorities other than local utility service and may lack the state-specific and utility experience necessary to ensure the provision of safe, adequate and proper service at just and reasonable rates, required in N.J.S.A. 48:2-1 et seq. Third, if the utility's credit ratings decline as a result of activities at the public utility holding company level or of an unregulated affiliate, the compensation demanded by providers of capital can increase. Consequently, to the extent that any New Jersey gas or electric public utility is or may be harmed in these ways by their public utility holding company, the new rules could reduce the operating costs of the New Jersey gas or electric public utility.

The Board is confident that its rule as adopted constitutes an appropriate balancing of the desire to attract needed capital into the energy sector with the need to protect ratepayers from unacceptable risks.

H. Alternative Policies

COMMENT (PSE&G): Instead of adopting the proposed rules, the Board should consider other alternatives. The Board could reinvigorate the informal stakeholder process and continue the dialogue with stakeholders to better understand the role that PUHCA played with respect to registered holding companies. The Board also could consider adopting new reporting requirements to facilitate further monitoring of diversification activities. Such reports would ensure that the Board is informed about diversification activities and would allow the Board to take further steps in a timely manner as appropriate using its existing authorities over New Jersey utilities.

RESPONSE: The Board believes the rule is an appropriate response in light of the comments and the stakeholder process. The Board's process in this proceeding has been purposely deliberative, including informal stakeholder comments, formal comments and a public meeting. This process has allowed the Board to consider alternative policies, including those proposed by commenters. Consequently, the Board believes that the rules are an appropriate balance between the interests of New Jersey ratepayers and utilities.

I. Grandfather Provision

COMMENT (PSE&G): The rules appear to apply to all holding companies, new and existing, and do not appear to give any consideration to Board approval of pre-existing holding company structures under a different regulatory regime. Our current ownership structure complies fully with the Board's requirements, and, assuming such regulation is within the Board's legal authority, it is inappropriate and unnecessary to apply these rules retroactively to pre-existing holding company structures. Therefore, the proposed rules should be revised to apply to holding companies that are formed after the effective date of these regulations. Alternatively, the rules could be revised to "grandfather" all existing investments so that only new investments would count toward the 25% cap. These alternatives will ensure that the rules do not impact legitimate investments made prior to the effective date of the rules by holding companies in reliance on and in full compliance with then-existing law.

It is imperative that the Board first determine whether all utility companies are in compliance as of the date of the rule's effectiveness. To the extent any companies are not in compliance the Board must identify the process it will use to determine how these companies are to be brought into compliance affording appropriate due process rights.

RESPONSE: The Board believes it has sufficient provisions in the rule to allay any concerns regarding initial noncompliance. For example, most of the previously provided services offered by the incumbent electric and gas utilities are covered by the "existing products and/or services" definition, and therefore are not counted towards the 25% diversification limitation. Moreover, the Board has completed an exhaustive examination of the asset portfolios of affected public utility holding companies, and is confident that none of the respective holding company systems will be in noncompliance with the rule as adopted.

Summary of Agency-Initiated Changes

The Board modified the definition of "Subsidiary" to enhance its clarity by rearranging various words and grouping clauses into sentences. No change was made to the meaning of the definition.

Federal Standards Statement

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. require State agencies that adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis. The new rules are necessary to replace the repeal of PUHCA, 15 U.S.C. §79a et seq., and to protect New Jersey ratepayers from potential harm. PUHCA was enacted by Congress in the 1930's to regulate holding companies owning electric or gas utilities. On August 8, 2005, President Bush signed into law the Energy Policy Act of 2005, which repealed PUHCA, effective February, 2006. PUHCA provides significant protections for the ratepayers of New Jersey, such as restrictions on the ability of public utility holding companies to diversify into other businesses unrelated to the provision of safe, adequate and proper utility service. The Board believes that such protections are crucial and should be continued at the State level. These adopted new rules, however, are not promulgated under the authority of, or in order to implement, comply with or participate in any program established under Federal law or under a State statute that incorporate or refers to Federal law, Federal standards or Federal requirements.

Accordingly, Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. do not require a Federal standards analysis for this adoption.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*:

SUBCHAPTER 4. PUBLIC UTILITY HOLDING COMPANY STANDARDS

14:4-*[4.1]* ***4A.1 Scope**

This subchapter sets forth requirements that apply to electric and/or gas public utilities that operate in New Jersey and are owned by a public utility holding company. The subchapter is intended to protect New Jersey utility ratepayers from the risks presented by the ownership of a New Jersey electric or gas public utility by a public utility holding company.

14:4-*[4.2]* ***4A.2* Definitions**

(a) As used in this subchapter, "Board", "electric public utility", "electricity related services", "existing products and/or services", "gas public utility", "gas related services", "person", "public utility holding company", and "shared services" have the same meaning as used in N.J.A.C. 14:4-1.2.

(b) The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

"Public utility holding company system'" means a public utility holding company, together with its subsidiary companies.

"Subsidiary" or "subsidiary company" of a public utility holding company means:

1. Any company*[, 10]* ***for which*** 10 percent or more of the outstanding voting securities of *[which]* **the company*** are directly or indirectly owned, controlled, or held with power to vote, by *[such]* ***the*** public utility holding company; and
2. Any person*[, the]* ***over whose*** management or policies *[of which the Board, after notice and opportunity for hearing, determines to be subject to a controlling influence, directly or indirectly, by such]* ***the*** public utility holding company *[(either alone or pursuant to an arrangement or understanding with one or more other persons) so as]* ***has a controlling influence that is sufficient*** to make it necessary for the rate protection of utility customers that such person be subject to the obligations, duties, and liabilities imposed by this subchapter upon subisidiary companies of ***public utility*** holding companies. ***This shall apply regardless of whether the public utility holding company exercises its influence directly or indirectly, either alone or pursuant to an arrangement or understanding with one or more other persons. The Board shall make this determination after notice and opportunity for hearing.***

"Voting security" means any security presently entitling the owner or holder thereof to vote in the direction or management of the affairs of a company.

"Nonutility associate" means a subsidiary company, in a public utility holding company system, that is not an electric or gas public utility or utility associate. ***Examples of entities excluded from this definition include, but are not limited to:**

1. **Entities that are developing facilities that will engage in public utility or utility associate activities; and**
2. **Entities that are directly related and subordinate to, or that directly support, public utility or utility associate activities, including, but not limited to:**
   - a. **Entities that provide fuel to generating plants;**
   - b. **Entities created to facilitate tax advantages;**
   - c. **Entities created to facilitate financing transactions;**
   - d. **Captive insurance and other risk management entities; or**
   - e **Entities that hold or manage emission allowances or other environmental allowances or credits.***

"Utility associate" means a subsidiary company, in a public utility holding company system, that directly or indirectly derives or will derive substantially all of its revenues (greater than 70%) from:

1. Producing, generating, transmitting, delivering, distributing, storing, selling, marketing, and/or furnishing ***natural*** gas, ***heating*** oil, electricity***, propane, thermal energy*** and/or steam energy to wholesale and/or retail customers;
2. Gas and/or electricity related services *[;]* ***including, but not limited to:**
   - i. **Energy management services and demand side management activities;**
   - ii. **Development and commercialization of electrotechnologies related to energy conservation, storage and conversion, energy efficiency, waste treatment, greenhouse gas reduction, clean coal technologies, and similar innovations;**
   - iii. **Ownership, repair, maintenance, replacement, operation, sale, installation and servicing of refueling, recharging and conversion equipment and facilities relating to electric and compressed natural gas powered vehicles;**
   - iv. **Sale of electric and gas appliances including equipment to promote new technologies, or new applications for existing technologies, that use gas or electricity and equipment that enables the use of gas or electricity as an alternate fuel and the installation and servicing thereof;**
   - v. **Production, conversion, servicing, sale and distribution of**
     (1) thermal energy products and resources, such as process team, heat, hot water, chilled water, air conditioning, compressed air and similar products;
     (2) alternative fuels such as coal gasification facilities and other synthetic fuels technologies, hydrogen fuel, landfill gas recovery, refuse derived fuels, biomass derived fuels, ethanol, methanol, and other alternative fuels technologies; and
     (3) renewable energy resources;

vi. Sale of technical, operational, management and other similar kinds of services and expertise relating to distribution, transmission, and generation including engineering, development, design and rehabilitation, construction, maintenance and operation, fuel procurement, delivery and management and environmental licensing, testing and remediation;
vii. Ownership, operation and servicing of fuel procurement, transportation, handling and storage facilities, scrubbers, and resource recovery and waste water treatment facilities, including activities related to nuclear fuels;
viii. Development and commercialization of technologies or processes that utilize coal waste or by-products as an integral component of such technology or process;
ix. Nuclear decommissioning trust activities;
x. Securitization activities, financing activities and tax advantaged transactions related to electric or gas public utility and utility associate activities;
xi. Development activities relating to other authorized electric or gas related activities or utility associate activities;
xii. Local community development investments relating to other authorized electric or gas related activities;
xiii. Revenues from sales of assets that were related to other authorized electric or gas related activities;
xiv. Captive insurance and other risk management activities;
xv. Holding and managing emission allowances or other environmental allowances or credits; or
xvi. Other utility related activities as determined on a case-by-case basis by the Board;*

3. Existing products and/or services ***and similar services provided by a subsidiary that is not a public utility***; and/or
4. Shared services.

14:4-*[4.3]* ***4A.3* Asset investments**

(a) Each electric or gas public utility and its public utility holding company shall ensure that the aggregate assets of all nonutility associates in the public utility holding company system ***do*** not exceed twenty-five percent of the aggregate assets of all public utilities and utility associates in the public utility holding company system.

<u>(b)</u> The Board may adjust *[this]* ***the*** percentage level ***in (a) above up to*** an additional 10 percentage points higher, *[or lower for each]* ***not to exceed 35 percent, upon petition by an*** electric or gas public utility *[as it deems appropriate to ensure safe, adequate and proper service]*. ***The Board shall consider any petitions filed pursuant to this provision on a case by case basis. Any adjustment to the percentage level must not compromise safe, adequate and proper service.***

[(b)] ***(c)*** Each electric or gas public utility or its public utility holding company shall file *[an]* ***all of the following in their*** annual report with the Board *[that includes]*:

1. A listing of names and total assets for each subsidiary in the public utility holding company system;
2. The assets of all nonutility associates as a percentage of total assets of all public utilities and utility associates in the public utility holding company system; *[and]*
3. *[A]* ***An annual*** certification by the chief executive officer *[and] ***as authorized by the*** board of directors, of the public utility holding company and electric or gas public utility, if applicable, that the percentage of assets in nonutility associates does not contravene this subchapter[.] ***;and***
4. ***All information required in the annual report pursuant to (c)1-3 above, shall be as of the end of the previous fiscal year.***